Supreme Court of the United States

No. 916

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No.

LEONARD M. BERNARD

and

JAMES B. JACKSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Leonard M. Bernard and James B. Jackson, respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW.

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit are appended to this Petition, and appear in the certified record. The original opinion issued January 6, 1961, and an additional opinion accompanied the denial of a rehearing on April 6, 1961.

The judgments of the United States District Court for the Northern District of Illinois, Eastern Division, which were appealed from consisted of sentences entered September 17, 1959 by the Honorable Edwin A. Robson. One of the petitioners here, Leonard M. Bernard, was sentenced to eighteen (18) months' imprisonment and a fine of Ten Thousand ($10,000.00) Dollars. The second petitioner here, James B. Jackson, received a suspension of the imposition of sentence and was placed on probation for a period of two (2) years. The third appellant in the Court of Appeals below secured the reversal of his sentence of imprisonment for six (6) months, and a fine of Five Thousand ($5,000.00) Dollars, by the judgment and opinion of the said Court of Appeals on January 26, 1961.

A fourth defendant in this case was acquitted by the District Judge on her motion at the close of the government's evidence.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on January 26, 1961. On April 6, 1961 it was ordered that the petition for rehearing be denied. (These orders appear in petitioners' Appendix hereto.) This petition is filed within thirty days of the denial of the petition for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Where, by separate, independent, but similar acts, employees received and retained, respectively, varying cash gratuities in excess of sales prices for automobiles

sold by their employer, a franchised dealer, which charged factory-suggested prices, did the employer corporation receive gross income to the amount of said cash gratuities retained by the employees, and not entered on the books of the corporation, or treated in its tax return?

2. Where the district court did not consider or submit any of these issues to the jury, but only, in effect, submitted a government theory of joint enterprise and vicarious liability and where the single count charged willful attempt to evade the Corporation tax by filing a false return, with no charge of conspiracy, were not the convicted defendants denied a fair trial and due process of law, by instructions near the end of the taking of government evidence, and again in the final charge that all previously limited evidence admitted against any defendant should be now considered against all, including the two remaining convicted defendants, and by refusal of a request for instruction that the guilt or innocence of each defendant was to be considered separately?

3. Were the employes in such a case embezzlers from the Corporation, extortioners from the corporate customers, or taxable recipients of gratuities independently accepted under claim of right, there being no proof of stock ownership or claim of constructive dividend?

4. Did not the refusal of a request to charge as follows,

> "'Throughout these instructions, I will refer to the defendants generally. You are instructed that each instruction is to be applied by you to each of the defendants separately. The reason for this is that each defendant stands on his own defense. You are to consider the evidence as to each defendant separately, and you must determine the guilt or innocence of each defendant separately",

constitute reversible error? Did not this error compound the confusion and unfairness of the instructions charging that presence of a common plan or to design to engage in a general course of corporate business transactions of the type shown by the evidence, would authorize consideration of previously limited evidence against all defendants?

5. Did admission over objection of testimony which evaluated and resolved conflicts in prosecution evidence by a witness described by the Court of Appeals Opinion (p. 6) as "an expert witness to his evaluation of the testimony" invade the province of the Jury and deprive the defendant of his right to trial by Jury?

6. Did not the admission into evidence as Exhibits of charts and summary made by such witness, which contained the result of judgment by the witness of evaluation of testimony and documents, and distribution of copies to the individual Jurors and submission of the charts to the Jury for consideration during deliberation, constitute reversible error, where the charts contained conclusive headings such as "Amount retained by witness who bought car" and "Understatement by Bernard Bros. Inc.," which were ultimate conclusions for determination by the Jury?

7. Was guilt ascertained under standards appropriate for a fair trial in the Federal Courts when fragmentary third party books and records, admittedly falsely kept, were received in evidence over objection, without proof of trustworthiness, under a mistaken application of section 1732 T. 28 U.S.C., and interpreted by witnesses who claimed no memory of the events, which were ten years past, at trial time?

Did this not deny confrontation by sworn witnesses subject to cross-examination as required by the Sixth Amendment?

8. Did not the refusal of the trial Court to grant inspection and use of the reports of Government witness agents, where they were requested under Section 3500, Title 18, U.S.C., constitute reversible error? And did not the Court of Appeals below decide the appeal below by a judgment and opinion which conflicts with its own prior decision (*U.S.* v. *Berry*, 277 F. 2d 826; *U.S.* v. *Sheer*, 278 F. 2d 65) and decisions of this Court (*Campbell* v. *U.S.*, 365 U.S. ....., 5 L. Ed. 2d 428, Jan. 23, 1951; *Clancy* v. *U.S.*, 5 L. Ed. 2d 574, Feb. 27, 1961)?

9. Is not the *Jencks Act* (Section 3500, Title 18, U.S.C.) unconstitutional if construed as a legislative restriction upon the duty of the "judicial Power" to afford fair trials and due process of law?

STATEMENT OF THE CASE.

The petitioners, Leonard M. Bernard and James B. Jackson, were indicted, along with Charles E. Bernard and Adelaide Locke Adsit, on March 4, 1955. The one-count indictment charged the four above-named individuals with attempting to evade the corporate tax of Bernard Bros., Inc., by filing and causing to be filed a false and fraudulent income tax return for the corporation for the year 1948. The indictment herein was unique, in that usually—in this type of case—the defendants are also charged in other counts with evasion of their individual taxes. In this case there was no charge of individual income tax evasion by any of the defendants. The corporation reported net income of $298,833.64 and paid taxes in the year 1948 in the amount of $113,556.78. The one-count indictment

charged that an additional amount of $78,053.82 was not reported as income, upon which an additional tax of $29,660.45 was due.

The trial lasted approximately five weeks, and while the government failed to prove the items of amounts alleged in the indictment and the bill of particulars, it contends that proof of unreported additional corporate income of $35,108.06 was made, on which additional tax in the amount of $13,341.07 was due and owing for the year 1948. The gross receipts of the corporation for the year were first less than $2,000,000.00.

Three of the four defendants were convicted in the court below, and an appeal was taken. The errors relied upon related to a practical amendment of the indictment by the government; and a conviction on a charge not made in the indictment; a denial of a plea in bar, based on the statute of limitations as to one defendant; the admission of "regularly falsely kept" records of third parties under Section 1732, Title 28, United States Code; error in admission of certain charts; error in the failure to grant several motions for mistrial; error in the restriction of defense cross-examination of government witnesses; error in the admission of evidence at variance with the bill of particulars; the insufficiency of the evidence; the failure to establish that the alleged payments were corporate income; failure to establish any motivation; and the failure of the court to give certain tendered instructions; and error with reference to certain given instructions.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, as to the defendants, Leonard M. Bernard and James

B. Jackson, and reversed as to the defendant, Charles E. Bernard, on the grounds that the evidence was insufficient to sustain a conviction as to this defendant.

STATEMENT OF FACTS.

Bernard Bros., Inc., a corporation, was engaged in the year 1948 in the sales of new Plymouth and De Soto automobiles, and in the sales of various types and makes of used automobiles. Its officers were: Leonard M. Bernard, President; Charles E. Bernard, Vice President, (whose conviction was reversed by the Court of Appeals), and James B. Jackson, Secretary and office accountant. Another defendant was Adelaide Locke Adsit,. the cashier and bookkeeper, who was dismissed on motion for judgment of acquittal, made at the close of the government's case.

The 1948 corporate tax return was signed by Leonard M. Bernard and James B. Jackson in their respective official capacities. The return reported net taxable income of $298,833.64 and a total tax due of $113,556.78, which was paid. The government contends that the proof in this case tends to demonstrate that the corporation had additional unreported income of $35,108.06, upon which additional tax in the amount of $13,341.07 was due and owing for the year 1948.

The government based its case on claimed corporate failure to report additional gross income, allegedly derived from gratuities over and above the invoice sales price to at least five persons, including the four defendants. No used car sales are charged or involved. No individual liability of any of the various defendants was charged in the indictment.

While the gratuity transactions were essentially alike, the proof took somewhat different forms. Most of the cars were sold to used car dealers, either directly or indirectly through persons known to the trade as "bird dogs", who secured the automobiles and, in turn, resold them to a used car dealer. Where the "bird dogs" were involved, specific transactions were proved by generalities. The "bird dogs" did not remember any specific transactions and did not keep records of their transactions. Thus, the proof of the overages depended upon the testimony of "bird dogs" who did not remember any specific transactions, and who did not keep books or records. Coupled with this "bird dog" testimony as to generalities, the used car dealers were permitted to testify that their records did not reflect what they purported to reflect, but, in fact, reflected something else. By this method of proof, the government contended that its evidence established that 103 new automobiles sold by Bernard Bros., Inc. in 1948 and shown upon its books as sold to individual purchasers, in whose names titles were issued by the Secretary of State of Illinois, upon applications signed by those persons, had, in fact, been purchased by the so-called "bird dogs", who made these purchases in the names of individuals, and represented that they were acting for the individuals, but in fact, were acting for used car lot dealers. These used car dealers resold the automobiles at prices above the factory-suggested prices for franchise dealers.

In the evidence introduced by the government, the names of the purchasers from these used car lot dealers usually appeared to be the names presented to Bernard Bros., Inc. and were the names in which Bernard Bros., Inc. issued invoices and bills of sale.

Govt. Exhs. 3, 4 and 5, books of Bernard Bros., Inc., showed a total sale of more than 800 new cars. The evidence given in its most favorable view for the government only involved 103 of these new cars. Besides this, it was established that Bernard Bros., Inc. did an extremely large used car business, which was not involved in any violation. The total sales of new and used cars amounted to approximately $2,000,000.00 for the year 1948.

With the foregoing in mind, so far as "new-used" cars were concerned, the government called as witnesses a number of "bird dogs", or persons who testified that they were able to purchase automobiles from Bernard Bros., Inc. during 1948. The government also called witnesses who said they acquired cars from said "bird dogs". These were used car lot operators usually.

One of the most important questions involved in the trial was how much money was paid for any particular "new-used car". There were eight witnesses who said that they dealt directly with either Leonard M. Bernard or James B. Jackson, petitioners herein, or Charles E. Bernard, or Adelaide Locke Adsit, defendants who are no longer in the case, or one George Smith, who was a sales manager of the corporation, and one of the principal government witnesses. E. Gallagher, the first of such witnesses, estimated that he had thirty-five transactions with the various defendants. He remembered no one transaction, and had no independent knowledge of any transaction. He could not remember any particular automobile. In turn, he sold the 35 automobiles to Nichols Motors Company of Chicago, Illinois. Two brothers, Gordon Nichols and Marvin Nelson, operated Nichols Motors Company. They dealt in cash with Gallagher. Transactions were not specific, as none of the parties, including Nichols

and Nelson, had any independent recollection of any particular purchase or sale. After stating an inability to recall any particular transaction, the Court then permitted testimony as to a variable pattern to be related by Gallagher and Nichols:

Usually, Gallagher would come to either Gordon Nichols or Marvin Nelson and state that he could get an automobile from Bernard Bros., Inc. Either Gordon or Marvin would draw a check to cash, cash it, and then turn the money over to Gallagher, who had no recollection of any particular amount, but he would also take some of the cash for himself. He did not know in what amount Nichols Motors drew any particular check. He did not know any amount he paid Bernard Bros., Inc., but he usually paid Adelaide Locke Adsit. Sometimes, Leonard M. Bernard was present. The 35 automobiles, so far as Bernard Bros., Inc. books are concerned, reflect the sale to an individual and separate purchasers. As far as any gratuities are concerned, the gratuities are shown to have been given to a person who was dismissed at the close of the government's case, and who is not a petitioner here.

Thus, out of 103 automobiles, the proof which reflects the payment of monies to the bookkeeper of the corporation in connection with the sale of approximately one-third of said automobiles was considered by the District Court to be insufficient.

The gratuities which were given to Adelaide Locke Adsit, who was found to be not guilty by the court, were admitted in evidence as against the petitioners, who did not receive said gratuities.

In order to demonstrate what was paid for the automobiles purchased by Gallagher, the government intro-

duced, over objection, certain Nichols Motors records, which were admittedly false, and then permitted witnesses who had no independent recollection of any particular transaction to *vary* the transactions, as reflected in Nichols' books, by testifying in effect that the entries were regularly falsely kept. From certain check stubs, drawn to everyone but Bernard Bros., Inc., Gordon Nichols and his brother, Marvin Nelson, though professing no recollection of any individual transaction, were permitted to testify that the amounts on the checks were the amounts that they turned over in cash to Gallagher.

This, then, is the basis upon which the government proved approximately how much was paid in gratuities to Adelaide Locke Adsit, a dismissed defendant.

Aside from evidentiary deficiencies, the foregoing represents the general pattern of the government's proof. In most instances, the actual purchaser from Bernard Bros., Inc. did not have any evidence of payment, other than as reflected in a third party's books. Of the eight witnesses who testified that they dealt directly with Bernard Bros., Inc., this is true of the following witnesses: Joseph L. Chapman, Lawrence Fisher, Anthony Antonucci, Adelaide Lorbeer, Joseph D. Kasny and Anthony Volante. In several instances, for example the witness Volante, the exact amount of cash paid was stated as having been paid to corporate employees.

Witnesses by the names of Raymond Stoltz, Frank Stoltz and Dolly Stoltz testified that they dealt directly with Bernard Bros., Inc., and had certain incomplete records, to which the defense objected. They were kept in much the same manner as the Nichols Motors Company records. Frank Stoltz and Dolly Stoltz were husband and wife,

and Raymond Stoltz was the son of Frank Stoltz. Their regular books were unaccountably missing, and the testimony of these witnesses depended largely upon a so-called "Police Book", an account in which entries were regularly falsely made. The same pattern was again followed, wherein the government attempted to prove by third party books some approximate prices for the automobiles.

After nearly all of the evidence was offered by the government as to "bird dog" and used car dealer testimony, which said testimony related to various conversations and payment of gratuities to various defendants, including a non-defendant, Mr. George Smith, during the year 1948, the government moved to admit all of the evidence as to each defendant as against all of the defendants. Over objection, the court then instructed the jury that the evidence against any one of the defendants was admissible against all co-defendants, with three exceptions. Conspiracy was not charged in the indictment.

At the conclusion of all of the purchaser witnesses, the government then called William Ruggaber, an Internal Revenue employee, who testified that he listened to all the testimony, and then prepared an exhibit which he referred to as a "Summary". (Govt. Exhs. 76A, B, C, D & E). Over objection, a copy of this exhibit was given to each of the jurors, and this witness testified to the contents thereof. The exhibit purported to be his evaluation of each of the previous government witnesses, and a computation, based on *his* appraisal of the amounts estimated to have been paid to various defendants, as well as to Mr. George Smith, whom the prosecutor did not see fit to have indicted. The exhibit was admitted in evidence and went to the jury, over further objection.

A revenue agent stated that he checked the balances of the accounts in the books of Bernard Bros., Inc. against the figures shown on the Bernard Bros. tax return, and then stated that the income reported on the books and records tied in with the item reported on the corporate tax return. At no time was any testimony given as to whether any of the alleged over-payments were reflected in Govt. Exhs. 3, 4 and 5, which contained approximately seventeen income accounts or categories in the books and records, where various types of income would be reflected. There was a substantial disagreement as to the adequacy of compliance with section 3500 Title 18 U.S.C. as to agent witnesses.

There is no evidence as to the disposition of the cash amounts respectively received by the individual employes, nor the respective totals, other than that in some instances it was pocketed. No proof was made of knowledge by any one of the defendants of the specific amounts or total received by any other. There was no proof as to whether any defendant was a shareholder of Bernard Bros. Inc., or Lee-Holder Company, as it was also called in the indictment.

REASONS FOR GRANTING THE WRIT.

This Honorable Court should exercise its jurisdiction in this case for the following reasons:

1. The Court of Appeals below decided this case by an Opinion contrary to it own prior Opinions and contrary to decisions of this Court.

2. The Court of Appeals below has sanctioned a course of conduct by a trial Court which is so contrary to usual and appropriate standards for a fair trial

in the district courts of the United States, as to call for an exercise of the supervisory powers of this Court.

3. The Court of Appeals has interpreted a decision of this Court in a prior case (*Clancy* v. *U.S.* 5 L. Ed. 2d 574, Feb. 27, 1961, No. 88 of the October 1960 Docket) in a manner which unduly limits and distorts the decision.

4. The Court of Appeals below has rendered an Opinion in which it did not properly apply Section 1732, Title 18, U.S.C. (admission of documents) and Section 3500, Title 18, U.S.C., (Jencks Act on agent witness reports).

5. Important questions which have not been resolved exist in this case.

The trial Court in this case at a point late in the extended trial, which consumed more than five weeks, gave the following instruction during the reception of Government evidence,

> "You are to consider all of the admitted evidence offered by the Government, with the exception of the three specifications that I have specifically noted, as having been received against all of the Defendants. Thank you." A. 1816.

Examination of the Appendix filed in the Court of Appeals would indicate the vigorous objection of the defendants and almost bitter complaint that they were being submitted to a surprise action after they had foregone cross-examination of the type required if the evidence had been admitted in the fashion it was presented.

The Court of Appeals did not rely upon the record to support its contention that no surprise existed, but merely repeated the words of the District Judge, page 7 of the Opinion.

The instruction given in the course of the reception of evidence, and recited above, was a peremptory command to consider all evidence against all of the defendants. It was not conditioned upon a finding by the jury that any agreement or conspiracy might exist.

This instruction was not repealed, revoked, excused or explained by the Court's final charge, which appears at pages 1959 and 1960 of the Appendix filed in the Court of Appeals.

While it is true that in the final charge the trial Judge submitted the possibility of the existence of a conspiracy for the decision of the jury, he did not correct in any manner his instruction given during the reception of evidence, A. 1816.

Therefore, on this crucial issue, there is an equivocal confusing charge to the jury, regardless of other errors involved in the Court's action at the prosecutor's behest. A conviction should not rest upon equivocal instructions upon a crucial issue. Even a good instruction will not cure a prior bad instruction, if both are left for the jury's consideration. *Bollenbach* v. *U.S.*, 326 U.S. 607, 613.

In a case decided on March 1, 1961 after the first opinion in this case on January 26, 1961, but prior to the denial of the Petition for Rehearing in this case, and just published in the Advance Sheets for May 1, 1961, the Court of Appeals below, for the Seventh Circuit, gave its opinion in *United States* v. *Pronger*, 287 F. 2d 498. This decision by another panel of the same Court of Appeals decided a

criminal case which was brought on appeal from the Northern District of Indiana, while the one at bar arose from a District Court of Illinois. District Judge Mercer the author in the case at bar sat on both panels. It is recognized that this Court has said there need not necessarily be uniformity in the decisions of various panels of a Court of Appeals. However, it is urged that the substantial variance in the position of the Court on the same question, requires the intervention of this Court to provide uniform justice for all, and to prevent confusion, and the nurturing of different Federal law in different States in the same Court of Appeals Circuit.

In the *Pronger* case, 287 F. 2d 498, the circumstance of equipoeal instructions was not as flagrant as in the case at bar. In the *Pronger* opinion, the facts were recited as follows, (P. 499)

> "Before the court proceeded to instruct the jury on the law, government counsel made a motion that Kadet's testimony as to his conversation with Roberts be admitted as to Pronger. The court remarked that it was his understanding that once there is sufficient evidence to establish a joint enterprise or concerted action of associated persons to accomplish an alleged crime, under those circumstances the alleged conversation of one alleged conspirator is binding on the alleged conspirators.
>
> "Counsel for Pronger suggested to the court that 'you should leave to the jury whether or not a common design has been established • • •.'
>
> "Government counsel urged that the prosecution had shown a common scheme or plan by the evidence itself."

The Court then instructed the jury and in the course of the instruction submitted the question of whether there

was a common design. At 287 F. 2d 498, 500, the Seventh Circuit Court of Appeals, which also decided the case at bar, said:

> "Whether intentional or not, we believe that the court's remarks had the effect of telling the jury that the government had proved that the common design or common concert of action of Roberts and Pronger, as charged, had been proved. If they did not have that effect, they merely succeeded in confusing the jury. In either event, Pronger was deprived of a fair trial by jury. 'A conviction ought not to rest on an equivocal direction to the jury on a basic issue.' *Bollenbach* v. *United States*, 326 U.S. 607, 613, 66 S. Ct. 402, 405, 90 L. Ed. 350.
>
> "For tese reasons, the judgment of the district court as to Pronger only is reversed and this cause is remanded to that court for a new trial as to the defendant Pronger."

Certainly by the same reasoning these petitioners were deprived of a fair trial by jury.

Further involved in this instruction was the conscious and deliberate effort to impose vicarious responsibility in a criminal case under the law of agency, where the crime involved required specific intent, willfulness, and knowledge.

There was no charge of conspiracy against these defendants. The trial Judge read into the indictment such a charge by his statement which is recited at page 7 of the Opinion of the Court of Appeals, "But the *broad terms* of the indictment would *imply* that there was a common design or a common plan to defraud the Government, with only one exception." No case will be cited by the United States which will support this derogation of the constitu-

tional requirements for adequate pleading in an indictment. Mere "notice" pleading cannot justify the requirement of the Constitution which commands that the accused shall be informed of the nature and cause of the accusation against him.

In the case at bar throughout the trial up to the motion of the Government to consider all evidence against all defendants, as is demonstrated by some 1800 pages of Appendix, the defendants were led to believe that each defendant was being tried upon the charge made against him, by the appropriate limitation of evidence as it was admitted.

Suddenly the indictment was distorted and amended to a conspiracy charge with no Overt Act specified, and with no dates or other premises against which the defendants could prepare.

In *Stirone* v. *United States*, 4 L. Ed. 2d 252, decided by this Court January 11, 1960, this Court unanimously condemned the amendment of indictments by the admission of evidence and, among other things, said:

> "And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same."

In the case at bar, although the District Court acquitted one defendant at the close of the Government's evidence, and the Court of Appeals found the evidence insufficient as to another defendant, the two petitioners were held responsible for all of the acts of these acquitted persons, regardless of knowledge of their acts. Motivation was given

little or no consideration at any stage of this proceeding. Yet, the record indicates no reason for either petitioner to distort the corporate income. No advantage is indicated by the evidence. Hence, it is contended that *Ingram* v. *United States*, 360 U.S. 672, 3 L. Ed. 1503, is appropriate for consideration. In determining the matter of motivation, the status of these defendants is important. Did they embezzle? Did they extort? Or did they receive gratuities under a claim of right, which monies were taxable to them as individuals?

It is respectfully submitted that the confusion in instruction to the jury which characterized this ten-year old five-week long prosecution and resulted in proof of half of the amounts alleged in the indictment, the acquittal of one of the four defendants by the District Judge, and the reversal of another defendant's conviction by the Court of Appeals, was further augmented by the refusal of the trial Court to charge as follows:

> "(The following instruction, designated Defendants' Instruction "B" was refused by the Court, and is as follows:)
>
> "Throughout these instructions, I will refer to the defendants generally. You are instructed that each instruction is to be applied by you to each of the defendants separately. The reason for this is that each defendant stands on his own defense. You are to consider the evidence as to each defendant separately, and you must determine the guilt or innocence of each defendant separately." A. 1932.

It has been urged in the Court of Appeals below that other instructions were tantamount to the one requested. However, no clear, lucid statement of this fundamental principle was given to the jury. It is not often that demonstrable prejudice is so apparent. Here the Court of Ap-

peals found it necessary to reverse without remand the conviction of one of the three defendants. It is submitted that no better reason for this reversal could be given than that he did not receive separate consideration of his guilt or innocence, which explains his conviction on insufficient evidence as apparently the Court of Appeals readily saw.

A matter of substantial importance is involved in the admission of evidence of the witness Ruggaber and the admission to the jury of charts and copies prepared by him. It is respectfully contended that the witness, at the behest of the prosecutor, illogically made arbitrary determinations and appraisals of the evidence, A. 1733, 1935, 1766, 1767.

No one can argue that the existence and amount of "understatement" by Bernard Bros. Inc., is not a crucial issue. When the trial Court permitted a document with substantial figures under this heading to be displayed to the jury, after the figures had been resolved by the rejection of some of the testimony, and the appraisal and evaluation of other evidence by the "expert" witness, and the exhibit is not only brought home to each individual juror by individual copies, but was sent into the jury during its deliberations, then these figures acquired "an existence of their own, independent of the evidence which gave rise to them", *Holland* v. *United States*, 348 U.S. 121, 128, 99 L. Ed. 150, 160; *Steele* v. *United States*, CA 5, 222 F. 2d 628; *Lloyd* v. *United States*, CA 5, 226 F. 2d 9, 17; *United States* v. *Ware*, CA 7, 247 F. 2d 698. All of these decisions warned against the danger of charts which, although not evidence, are always likely to become more potent in unwary reasoning than true evidence, even in cases where the charts truly do no more than portray admissible evidence without conclusions.

To summarize the Government's evidence in this case, would lead to a statement that guilt was demonstrated not by the sworn testimony of witnesses, but by the recitation by witnesses of figures from untrustworthy books and records which were admitted under a misunderstanding of Section 1732, Title, U.S.C. This misunderstanding is to the effect that any book and record kept, is admissible if produced. In the case at bar, there was a complete abandonment of test of trustworthiness, and fragmentary third party records were admitted and were used as a basis of testimony by witnesses who stated they could not recall the facts. Obviously, these books could not be cross-examined. Nor could the witnesses be cross-examined about events which they professed they did not recall, A. 160, 545, 594, 595, 1260.

Thus, we have a picture of a witness who, under oath, says he cannot remember any particular transaction, A. 186; he is permitted to say the books would reflect the transaction, A. 72; he is permitted to state the books are true and correct, A. 72. Then, he is permitted to testify the books do not mean what they say; that false entries were regularly entered thereon, and that they mean something different from what they portrary, A. 153, 162, 187, 188. *Palmer* v. *Hoffman*, 318 U.S. 109, at pages 113 and 114, proclaims this Court's standard for the use of Section 1732, Title 28, U.S.C. Certainly, no Court should countenance untrustworthy records as a fundation for criminal convictions.

During the trial, the trial Judge in administering the so called Jencks Act, Section 3500, Title 18, U.S.C., examined, *in camera*, reports of agent witness Sharp. Very limited expurgated portions of his written reports concerning the case about which he testified were submitted to the de-

fendants for their use on cross-examination and in defense. By inadvertence, duly explained in the Court of Appeals, it was learned that at least part of these reports related to Sharp's examination of the corporation mentioned in the indictment and the examination of the tax liability of other witnesses, and of the defendants in the case.

Clearly, Sharp, the investigative agent, had accepted the self-serving claims of Smith, an employee of the corporation mentioned in the indictment, indeed the general manager, who admitted on the witness stand that he had accepted over-invoice gratuities. Sharp excused Smith from criminal liability and, perhaps, from tax liability by acceptance and belief of his, Smith's, statements. Government witnesses Kaziny and Gallagher were in the same category, except that they were dealers whose statements that they overpaid for automobiles were permitted to justify their deductions of these amounts from their gross income, whereby they avoided tax liability.

Sharp had an interest in avoiding criticism for undue leniency or for gullibility, if such existed. The right to cross-examine and place him in what the Court of Appeals below called a "proper prospective", including his relationship to the Government and its witnesses was clearly important. If it could have been demonstrated that Sharp expressed doubt or had contradicted the self-serving statements of these witnesses, his value as a Government witness would have been substantially damaged. Of course, all the exploratory possibilities of cross-examination cannot be exhausted by the mere imagination of defense counsel. Knowledge of the facts is necessary, and these reports of Sharp and the possibilities of their use have been suppressed from the petitioners by the trial and appellate application of the Jencks Act.

The defendants contend that the Seventh Court of Appeals has heretofore by *United States* v. *Berry*, 277 F. 2d 826, and *United States* v. *Sheer*, 278 F. 2d 65, correctly held that the entire reports of agents who become Government witnesses should be given to the defense. It is further the belief of the petitioners that this Court in *Campbell* v. *United States*, 5 L. Ed. 2d 428, Jan. 23, 1961, and *Clancy* v. *United States*, 5 L. Ed. 2d 574, Feb. 27, 1961, and prior decisions has indicated appropriate standards for the administration of Section 3500, Title 18, U.S.C. It is contended that these decisions stand for the proposition that the defendants are entitled to the written reports of a Government agent who takes the witness-stand insofar as they pertain to the case about which he testified.

This Court has held in *Jencks* v. *United States*, 353 U.S. 657, that:

> "The defense must initially be entitled to see them . to determine what use may be made of them."

And in the footnote thereto:

> "The trial judge cannot perceive or determine the relevancy and materiality of the documents to the defense, without hearing defense argument, after inspection, as to its bearing upon the case."

Does the defendant, who has availed himself of the statutory right of review, ever have the right to advocacy of counsel in the determination of whether or not the trial judge erred in refusing access to "statements", cognizable under 18 U.S.C. 3500, but refused as irrelevant and immaterial to the subject matter?

Anything in these reports which might have demonstrated bias or prejudice against the defendants, and in this case, motivation of his readiness to recall events and conversations ten years old, but not recorded in his notes

or reports, would be of vital importance in judging his credibility. (See *Alford* v. *United States*, 75 L. Ed. 624 and *Gordon* v. *United States*, 344 U.S. 414, on relationship of the witness to the prosecution).

It is further respectfully contended that the so-called Jencks Act, enacted subsequent to the decision of this Court in *Jencks* v. *United States*, 353 U.S. 657, and obviously by its language and history intended as a restriction upon the ruling in that decision, is unconstitutional if it impinges or authorizes impingement upon the constitutional right to confrontation by witnesses under oath, and the right to cross-examine, as set up in the *Jencks* decision, the *Alford* decision, and in the *Gordon* decision. Without any statute these cases held that the defendant had the right of exploratory cross-examination and to the statements of the witness to show the relationship of a witness to the prosecution, including its other witnesses. These decisions were reached on the basis of constitutional right of defendants. If the statute is to be construed as restricting or impinging upon this constitutional right, then this Court should declare it an attempt by the Legislature to infringe upon the powers and duties of the Judiciary, and as an attempt to restrict the administration of constitutional fair trials.

CONCLUSION.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MAURICE J. WALSH
Counsel for Petitioners.

APPENDIX.

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit.

SEPTEMBER TERM, 1960 SEPTEMBER SESSION, 1960

No. 12868
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
LEONARD M. BERNARD, CHARLES E. BERNARD and JAMES B. JACKSON,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 26, 1961.

Before HASTINGS, *Chief Judge*, and DUFFY, *Circuit Judge*, and MERCER, *District Judge*.

MERCER, *District Judge*. The defendants, Leonard M. Bernard, Charles E. Bernard and James B. Jackson, were charged by indictment with having wilfully attempted to evade and defeat a part of the corporation income tax due and payable to the United States of America for the taxable year 1948 by Bernard Bros., Inc., a corporation, by the filing of a false and fraudulent income tax return on behalf of that corporation.[1] The return was alleged to have been false and fraudulent, as defendants well knew, in that the corporate income therein reported was understated in the amount of approximately $78,000.00 and that the tax due to the United States was therein understated

[1] The indictment also named the former cashier and bookkeeper of Bernard Bros., Adelaide Locke Adsit, as a defendant. The court directed her acquittal at the close of the government's case.

by approximately $30,000.00. After a trial before a jury, a judgment of conviction was entered by the court upon the jury's verdict finding all defendants guilty as charged in the indictment. Defendants appeal from that judgment.

During 1948, Bernard Bros., Inc., was a franchised dealer in new DeSoto and Plymouth automobiles at Evanston, Illinois. Defendants in the respective order in which they are above named, were the president, vice-president and treasurer of that corporation. For the taxable year 1948 an income tax return was filed on behalf of the corporation reporting taxable income of $298,833.64, and a total tax due of $113,556.78. That return was signed by defendants, Leonard M. Bernard and James B. Jackson, in their respective capacities as president and treasurer of the corporation.

The judgment must be reversed as to the defendant, Charles E. Bernard. The government concedes in its brief "that the evidence of Charles Bernard's guilt lacks the overwhelming persuasiveness of the case against Leonard Bernard and Jackson." We are convinced upon a review of the record that the evidence against this defendant lacks overwhelming persuasiveness to such extent that there is no evidence of his guilt of the crime charged.

Viewed in the light most favorable to the government, the evidence shows only that Charles Bernard was the vice-president of the corporation in 1948 and that he participated to some extent in the conduct of the corporate business in that year. The evidence fails to show that he had any knowledge of the books and records of the corporation, or that he participated in the preparation of the corporate tax return for 1948 or had any knowledge as to the filing or content of that return. His motion for acquittal made at the close of the government's case should have been granted.

The remaining defendants, Leonard M. Bernard and James B. Jackson, who are hereinafter referred to as defendants, except as the context otherwise requires, assert

a number of alleged procedural errors as a basis for reversal of the judgment. In order that these alleged errors may be placed in focus, the following summary of background facts and of the procedural chronology of the trial is set forth in advance of discussion of the particular errors alleged.

The theory of the government's case was that defendants, as officers and agents of Bernard Bros., adopted a policy of selling a substantial part of the corporation's new 1948 automobiles to used car dealers for a cash bonus over and above the manufacturer's list price; that, upon the sale of such cars for a cash bonus, the list price only was entered in the corporation's sales records; and that bonus payments received for such cars were not included in the corporation's gross sales as reported in the 1948 corporation tax return. To sustain its burden of proof upon that theory, the government undertook to prove the receipt by defendants and other agents of the corporation of cash bonus payments upon the sale of 103 specific new cars sold in 1948, and the omission from the corporation tax return of the specific items of income reflected in the receipt of such bonus payments.

As the keystone of its specific-omitted-item proof, the government introduced into evidence the corporate records of Bernard Bros., and the key book of those records was the sales journal, which contained entries reflecting a sales price and a factory installed identification serial number for each new car sold by the corporation in 1948.

The foundation for introduction of the Bernard Bros. records was laid by the testimony of Robert H. Sharp, an internal revenue agent. Sharp testified that he had received the Bernard Bros. books, including the sales journal, from the defendant Jackson, in 1950. In July, 1950, Sharp and a second agent made a complete transcript of new car sales for the year 1948 as shown by the entries in those books and records. From comparison of that transcript with the Bernard Bros. sales journal, Sharp was able to testify that the sales journal was the same

book from which he had made the transcript of new car sales in July, 1950. Sharp further testified that the net taxable income figure of $298,833.64, reported on the Bernard Bros. income tax return for 1948, was derived from the books which he had examined, and that the closing journal entries of all profit and loss accounts shown upon the corporation's books agreed, precisely, with corresponding items reported on the return. He testified that he could identify the books, including the Bernard Bros. sales journal, as records kept by Bernard Bros., because they had been supplied to him at his request by the defendant, Jackson, and had been identified to him as the Bernard Bros. books by both Jackson and Leonard Bernard. Sharp also testified that Leonard Bernard had stated to him in 1950 that all gross income of Bernard Bros. for 1948 was reflected in the books supplied to Sharp by Jackson and in the corporation tax return filed on behalf of the corporation for 1948.

The testimony of Sharp and the Bernard Bros. books constituted the first leg of the government's specific-omitted-item proof. The second leg of proof was approached through the testimony of witnesses and certain records of used car dealers which tended to show that each of the 103 new cars had actually been sold to a used car dealer, either directly or indirectly, and that defendants and agents of Bernard Bros. had received a greater price for each of those cars than that shown by the corporation's books.

The 103 sales fell into two categories, direct and indirect. Adley Lorbeer, Anthony Volante and officers of Stoltz Motors, Inc., which is hereinafter referred to as Stoltz, testified with respect to a number of transactions in the first category. For example, Volante testified that he had purchased new Plymouths from Bernard Bros. in 1948 and that he had dealt with the sales manager George Smith in these transactions. He identified 7 invoices which he had obtained from Bernard Bros. with the delivery of new Plymouths purchased in 1948 from that corporation. Each of those documents identified, by factory

serial number, one of the new automobiles shown by the Bernard Bros. sales journal as having been sold in 1948. He further testified that he had paid exactly $400.00 more than the invoice price for each of the automobiles purchased.

The other direct sale testimony was similar, consisting of the testimony of witnesses and the identification of invoices, checks or business records tending to show the purchase in 1948 by a used car dealer witness of specific new automobiles which could be identified with entries in the Bernard Bros. sales journal. In some instances the government sought to prove the bonus price paid for specific cars by oral testimony. In others, the evidence of amount of bonus payments was reflected upon the car dealer's records.

The second category of transactions, indirect sales, encompassed a majority of the specific transactions to which the government's evidence related. In in direct transactions, new cars were channeled to used car dealers through third parties who were commonly known to the trade as "bird dogs".

"Bird-dogs", Edward Gallagher, Lawrence Fisher, Anthony Antonucci, Raymond Stoltz and Joseph D. Kaziny, were key government witnesses relative to indirect sales.

The testimony of Gallagher is representative of the "bird-dog" evidence adduced by the government. Gallagher testified that he had purchased a number of new cars in 1948 from agents of Bernard Bros. for Nichols Motor Sales, a used car dealer, which is hereinafter referred to as Nichols. He could not recall the dates and auto serial numbers involved in any transaction, but stated that, in each instance, he paid cash for the car purchased and received a Bernard Bros. invoice for each car purchased. He further testified that the car and invoice were delivered by him to Nichols.

Gordon Nichols and other Nichols' employees were then called by the government to lay the foundation for the

introduction of records kept by Nichols relative to the purchase of cars in 1948. Those records, and the testimony relative thereto, tended to prove that Nichols had purchased 35 new cars from Gallagher in 1948 which were shown by the sales journal of Bernard Bros. as having been sold by that corporation.

The evidence of other "bird-dog" transactions followed the same sequence—the testimony of the "bird-dog", followed by introduction of the records of the used car dealer for whom he had purchased new cars.

Although the testimony as to each particular transaction differed, the transactions as to which evidence was adduced were all similar in nature. The witnesses, whether "bird-dog", used car dealer or used car dealer employee, testified as to a sequence of events substantially as follows: Each witness approached one of the defendants, Charles Bernard or Mr. Smith to arrange for the purchase of a new car or cars; the person with whom he dealt would, in each instance, require that the car be paid for in cash for a price above the manufacturer's list price thereof and that the purchaser supply to Bernard Bros. the name of some person, either real or fictitious, to whom the car would be invoiced and in whose name an application for a certificate of title would be executed; an invoice was delivered with each car which showed only the manufacturer's list price as the sales price thereof; and that the car, and the invoice bearing the name supplied by the purchaser, would then be delivered to the purchaser for the agreed cash consideration. Each such car was then offered for sale by the ultimate dealer-purchaser as a "like-new" used car, *i.e.*, a car showing less than 100 miles of use.

The amount of the bonus which the witnesses testified they had paid to the corporation through one of defendants, Mr. Smith or Adelaide Locke Adsit, Bernard Bros. cashier and bookkeeper, varied with the different transactions. The government's evidence with respect to the 103 identified new cars tended to prove that cash "bonuses"

therefor aggregating a minimum amount of $34,108.06 had been paid in 1948 to agents of Bernard Bros. Agent Sharp testified that his inspection of the Bernard Bros. books revealed that all cash bonuses were systematically excluded from the recorded sale price of each car.

The government's case was concluded by the testimony of William Ruggaber, an employee of the Bureau of Internal Revenue. Ruggaber was present in court and heard the testimony of the various "bird-dog" and used-car dealer witnesses. From that testimony and the exhibits in evidence Ruggaber prepared a summary containing his computation of the amount of the cash bonus received by officers and employees of Bernard Bros. upon each of the 103 transactions. Over defendants' objection, a copy of that summary was given to each juror as Ruggaber testified as an expert witness to his evaluation of the primary evidence and the mechanics of his preparation of the summary. After the witness had testified, the summary prepared by him was admitted in evidence as an exhibit and given to the jury, over defendants' further objection, for use in their deliberations.

The major contentions now asserted against the judgment arise out of the summarized procedural aspects of the trial.

A major contention urged by defendants for reversal of the judgment is premised upon the asserted error of a ruling related to the admissibility and use of evidence. As the various "bird-dog" and used-car dealer witnesses testified to transactions and conversations with one, or more, of defendants, Charles Bernard or Mrs. Adsit, admission of the testimony was limited to the particular person to whom it pertained. Near the close of its case, the government moved that such testimony be admitted against all of the parties named in the indictment upon the theory that the evidence tended to prove a common scheme or design between defendants, Charles Bernard and employees of Bernard Bros. to sell new cars for bonus prices, in the furtherance of which each party had acted as agent

for each of the other parties. Over defendants' objection, the government's motion was allowed, and all of the evidence, with certain specific exceptions noted, was admitted as competent evidence against each of the defendants named in the indictment.

Defendants now assert that the trial court, by so ruling, permitted them to be convicted of conspiracy, a crime not charged in the indictment. That premise overlooks and misconstrues the theory upon which the government's motion was made and allowed by the court. In moving that evidence admitted as against the individual defendants be admitted as against all defendants, the government relied upon the principle of vicarious responsibility of all joint venturers for all acts done and statements made in furtherance of the object of the joint scheme or undertaking. As a preface to its ruling allowing the government's motion, the court said, in pertinent part:

> "But the broad terms of the indictment would imply that there was a common design or a common plan to defraud the government, with only one exception.
>
> "There was very extensive cross-examination by counsel for the defendants. They examined into each and every area. The one exception was Mr. Walsh, as to one of defendants in this case.
>
> "Under the circumstances, I feel that the motion of the Government at this time could not be construed to be taking the defendants by surprise, so that they did not have an adequate opportunity to cross-examine as to the various issues in the case; and I therefore hold that the testimony and the exhibits in each and every case, with the exception of those outlined will apply to all defendants in the case; and the motion of the Government is allowed."

In its charge to the jury on this phase of the case, the court said, in pertinent part:

> "When men enter into an agreement for an unlawful end, they become agents for one another. What one

does pursuant to the common purpose, all do, and declarations, statements or conversations by one in furtherance of the common design and during its continuance are competent against all.

"During the course of the trial, various testimony and exhibits were received in evidence only as to certain defendants, and you were instructed that such evidence was not then to be considered against any defendant to whom the evidence did not pertain. Later, near the close of the government's case you were instructed that such evidence, with certain exceptions, had been admitted as to all defendants and that you might consider such evidence as pertaining to all defendants.

"If you now find beyond a reasonable doubt from all the evidence in this case that there was a common plan or design to engage in a general course of corporate business transactions of the type shown by the evidence, you may consider all the acts [of each of the individual defendants as evidence pertaining to all.]

"On the other hand, if you find from all the evidence that such a common plan or design was not shown beyond a reasonable doubt then you will consider the acts and declarations of each defendant only as to him and not to any other defendant."

From our review of the record, it is apparent that we are dealing in this phase of the case with a question of the admissibility of evidence only, not one of any amendment of the substantive charge of the indictment. The evidence complained of was admitted by the court and submitted to the jury upon a theory of the vicarious responsibility of all joint ventures for all acts done and declarations made by each in furtherance of the joint undertaking. The question whether a common plan or design was proved beyond a reasonable doubt was properly submitted to the jury.

Authority for the ruling is found in *Reistroffer* v. *United States*, 8 Cir., 258 F.2d 379, 386-388; *United States* v. *Pugliese*, 2 Cir., 153 F.2d 497, 500; *United States* v. *Olweiss*, 2 Cir., 138 F. 2d 798, 799-800, cert. denied 321 U.S. 744. To the same effect is *American Fur Co.* v. *United States*, 2 Pet. (27 U.S.) 358, 364-365. We find no analogy between the ruling in this case and the case of *Stirone* v. *United States*, 361 U.S. 212, upon which defendants' principal reliance is placed. There the indictment charged that Stirone had interfered with the movement of certain sand in interstate commerce by an act of extortion. When the government's evidence tended to prove that the statute of limitations barred prosecution for interference with the movement of sand, the court allowed the introduction of evidence tending to prove interference with the interstate movement of steel manufactured by a steel mill constructed from the sand alleged in the indictment. In reversing the judgment of conviction, the Supreme Court held that the latter evidence related only to substantive acts not charged in the indictment, and that the admission of such evidence had the effect of permitting the government to amend the indictment against Stirone by the use of evidence.

We hold that the court's ruling admitting the evidence against all defendants was proper.

Error is assigned upon the admission by the court of numerous documents and books from the records of the used-car dealer witnesses. The exact contention of defendants upon this phase of the case, as embodied in their brief, defies precision of statement. Their apparent contention is that it was in some manner unjust and prejudicial to permit the Bernard Bros. books which were compact and well arranged to be contradicted by used-car dealer records and documents which were in some instances incomplete and, in part, inaccurate.

From time to time as the trial progressed, the purchase journal of Nichols, the "police books" of Park Motor Sales, Atlas Motors and Stoltz, stock cards of Parks, en-

velopes kept by Atlas for each car purchased, invoices identified as having been issued by Bernard Bros., and cancelled checks and check stubs of several used-car dealer witnesses were admitted as exhibits. We do not deem it necessary to set forth in detail the description or trial history of each document. We have examined the foundation laid for the introduction of the documents in each instance, and we conclude that all were properly admissible as records made in the regular course of a business, 28 U.S.C. §1732(a); *Palmer* v. *Hoffman*, 318 U.S. 109, 112-114; *United States* v. *Wicoff*, 7 Cir., 187 F.2d 886, 889, or as documents corroborating the oral testimony of witnesses.

Defendants' argument, that some of these business record exhibits were demonstrated to be inaccurate in certain respects goes to the weight or credibility of the documents, not to any question of admissibility. As we observed in *United States* v. *Wicoff*, 7 Cir., 187 F.2d at 889 "Title 28 U.S.C.A. §1732 provides for the admissibility of books and records made in the regular course of business, but does not require that they be correct in all respects." Accordingly, we will devote further discussion of this phase of the case to only two of several specific contentions.

The court admitted the check stub records of Nichols. Gordon Nichols identified the stubs of checks written in the course of various transactions for the purchase of specific cars in 1948. These stubs, variously, showed that the checks were payable to cash or to one of the proprietors of Nichols. In addition, each stub upon which the government's case depends bore the written notation, "Gallagher". Mr. Nichols testified that the name of the "bird-dog" was regularly noted upon the stub of each check written for the purchase of an automobile from a "bird-dog"—that the notation, "Gallagher", upon each of the stubs introduced in evidence denoted that the check had been issued for the purchase of a car from Gallagher.

We hold that the check stubs and explanatory testimony were properly admitted in evidence, upon the foundation testimony that the stubs were regularly prepared in the conduct of Nichols' business. The circumstances of the placement of the notation, "Gallagher", upon particular stubs, and the necessity for explanatory testimony, affect the weight and credibility of the evidence, not the admissibility. *Bodnar* v. *United States*, 6 Cir., 248 F.2d 481, 482-483.

We conclude that defendants' contention against the admissibility of the "police books" of Atlas and Stoltz also lacks merit. Each of those books was kept pursuant to the provisions of an Illinois statute, (now I.R.S. 1959, c. 95½, Sec. 5-401), which required all car dealers to keep records containing sufficient information as to the identity of cars purchased and sold to aid law enforcement officials in the enforcement of the motor vehicle theft laws. Both Atlas and Stoltz entered upon their "police books" the price for which each automobile had been purchased, in addition to the information which the statute required. The foundation testimony disclosed that the amount of the purchase price of each car was customarily recorded in the "police book" as a regular record entry. It is wholly frivolous to contend, as defendants do, that the character of such books as a record made in the regular course of a business is destroyed merely because more information was recorded therein than the State statute required.

The distinction between *Hartzog* v. *United States*, 4 Cir., 217 F.2d 706, and *Bruce* v. *McClure*, 5 Cir., 220 F.2d 330, upon which defendants principally rely in their argument against the admissibility of these records, is readily apparent upon reading the reported opinions in those cases.

We have examined the circumstances of the trial court's admission in evidence of the summary prepared by Ruggaber, and we hold that the admission of that summary was not error. The use of charts and summaries of voluminous records and testimony, as secondary evidence, has

been approved in *United States* v. *Johnson*, 319 U.S. 503; *Somberg* v. *United States*, 7 Cir., 71 F.2d 637; *Smith* v. *United States*, 6 Cir., 239 F.2d 168, cert. denied 353 U.S. 983; *Corbett* v. *United States*, 9 Cir., 238 F. 2d 557, cert. denied 352 U.S. 990; *Blackwell* v. *United States*, 8 Cir., 244 F.2d 423, cert. denied 355 U.S. 838, among other cases. In *Lloyd* v. *United States*, 5 Cir., 226 F.2d 9, one of the cases upon which defendants principally rely, the court stated that admission of charts made by government agents summarizing the basic evidentiary facts is discretionary with the trial court and that the court's exercise of discretion in that regard can be reviewed only upon a clear showing of abuse and resulting prejudice to the accused person. Although the court there expressly disapproved the inclusion of certain conclusionary statements in summaries admitted in evidence, the reversal of the judgment was on other grounds. The court, expressly, did not decide whether the use of the charts was prejudicial error.

The Ruggaber summaries were admitted by the court as summaries of the primary evidence, only, and not as primary evidence within themselves. Examination of the record discloses that defendants were afforded full opportunity to cross-examine Ruggaber with respect to the summaries and his method of making the same. With respect to the testimony of Ruggaber, the court instructed the jury that his testimony was entitled to weight as evidence only to such extent as the jury should find that the primary testimony of other witnesses and the exhibits upon which his expert testimony was based was entitled to weight and credibility. With respect to the Ruggaber summaries, the court stated in its charge to the jury:

> "Such exhibit has no independent value. If you choose to disregard as evidence all or a part of the testimony of any witness in this cause or do not accept the correctness of any document admitted into evidence, then you must likewise disregard so much of the summary as is based upon the testimony of such witnesses and such documents you decide so to disregard."

Those instructions meet all of the requirements for the use of such evidence as set forth in the cases above cited.

Equally wanting in merit is the defendants' contention that the evidence was insufficient to sustain their conviction. Defendants' argument is premised principally upon the contention that the evidence tended to show only that "under-the-table" payments were received by various individuals, including defendants, but that there is a lack of proof that such "under-the-table" payments were ever received by the corporation. The court correctly charged the jury that monies received by officers and agents of a corporation in the sale of property offered for sale by the corporation is corporate income. *Burger* v. *United States*, 8 Cir., 262 F.2d 946, 955-956. It is immaterial that all or a part of that money may have been embezzled from the corporation by the person who received it as defendants suggest. Assuming, arguendo, that that contention is a fact, the money received was none the less corporate income. *Burger* v. *United States, supra.* The cases of *Rutkin* v. *United States*, 343 U.S. 130, *Briggs* v. *United States*, 4 Cir., 214 F.2d 699, and *Davis* v. *United States*, 6 Cir., 226 F.2d 331, upon which defendants rely are inapposite. Each dealt only with the question whether funds embezzled from a corporation, or received by an individual through extortion, constituted taxable income to the individual.

Upon the evidence the jury could find that defendants systematically omitted cash bonus payments from the Bernard Bros. books and from the 1948 corporation tax return in a wilful attempt to evade a substantial part of the income tax due for that year.

Defendants contend that the court erred in its charge to the jury and in its refusal to give certain instructions tendered by the defendants. We have examined the court's charge to the jury as a whole, and we conclude that the jury was correctly instructed. The charge, as a whole, is both complete and fair to the defendants.

That conclusion might well dispose of the whole of defendants' many contentions against the charge given, but we deem it advisable to mention briefly several specific points raised.

During the trial of the case the court permitted the use of grand jury minutes in questioning the witness, Edward Gallagher. In its charge, the court cautioned the jury that it might consider those questions and answer read from the grand jury minutes only in so far as they tended to impeach Gallagher. That statement was part of the charge to the jury relating to the impeachment of witnesses. A cautionary instruction was necessary in view of the use of the grand jury minutes and the charge given correctly stated the law.

The charge with respect to accomplice testimony was a correct statement of the law. *United States* v. *Echeles*, 7 Cir., 222 F.2d 144, cert. denied 350 U.S. 828; *Delvalley* v. *United States*, 7 Cir., 88 F.2d 579, and was necessary to present the testimony of George Smith to the jury in proper perspective.

The charge given with relation to the fact that defendants did not testify was in compliance with the principles stated in *Brun* v. *United States*, 308 U.S. 287, and was essentially identical to the instruction which we approved in *United States* v. *Fleenor*, 7 Cir., 162 F.2d 935.

The charge given with respect to the weight to be given to character witness testimony is essentially identical to the charge which we approved in *United States* v. *Echeles*, 7 Cir., 222 F.2d 144, cert. denied 350 U.S. 828. We distinguish *United States* v. *Semeniuk*, 7 Cir., 193 F.2d 508, upon authority of the *Echeles* case.

In summary, upon consideration of the court's charge to the jury as a whole, we find that the jury was correctly instructed as to the elements of the offense charged, as to the rules for the jury's consideration of, and weight to be given to, the evidence, as to the respective functions of jury and trial judge, as to the use of the evidence

against the various defendants and as to the proper respective positions of the government and the defendants with relationship to the burden of proof and the presumption of innocence. We find the court's charge to have been eminently fair to the defendants and complete in every necessary respect. We therefore reject all contentions of defendants with relation to the propriety of the court's charge, and the rulings upon tendered instructions.

Finally, defendants contend that written reports made by agent Sharp to the government reveal that the affairs of the witnesses, Smith, Kaziny and Gallagher, were under investigation by the Bureau of Internal Revenue simultaneously with the investigation of the affairs of Bernard Bros. By their supplemental brief, defendants contend that the court's ruling denying them access to such reports prevented them, on cross-examination of Sharp, from exposing and developing any promise of leniency, or other relationship, between Sharp and the government, on the one hand, and Smith, Kaziny and Gallagher, on the other.[2]

In *United States* v. *Killian*, 7 Cir., 275 F.2d 561, Pet. cert. pend'g, we held that the Jencks Act, 18 U.S.C. §3500, requires the production only of such written statements and reports as are related to the subject of a witness' direct testimony. The fact and the timing of any investigation of Smith, Kaziny and Gallagher have no relevant relationship whatsoever to Sharp's direct testimony. The demand for production of the statements in question was properly denied.

This is not a case comparable to *United States* v. *Sheer*, 7 Cir., 278 F.2d 65, or *United States* v. *Berry*, 7 Cir., 277 F.2d 826, in which there was a failure to produce for the court's examination statements and reports made by government witnesses which related to the subject matter of the issues of the trial.

We have carefully considered the many other contentions, and subcontentions, of defendants' shot-gun ap-

[2] After Sharp had testified on direct examination, defendants invoked the Jencks Act, 18 U.S.C. §3500, and demanded that all written statements and reports made by Sharp and related to his Bernard Bros. investigation be produced for their inspection and use. The trial judge ordered that all such

proach to their attack upon the judgment of conviction. We have concluded that all are without merit, and that further specification or discussion thereof would only lengthen an already overlong opinion.

The judgment is reversed as to Charles E. Bernard. The judgment as to the defendants, Leonard M. Bernard and James B. Jackson is affirmed.

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[2] (Continued)

statements and reports be produced by the government for inspection by the court *in camera*. See *United States* v. *Kelhan*, 7 Cir., 275 F. 2d 561, Pet. cert. pend'g. After his *in camera* inspection of the reports, the trial judge ordered that certain reports, and parts of other reports, be delivered to defendants. The court then ordered that all other statements and reports to which defendants had been denied access be sealed in order that they might be available for any appeal.

Through oversight, one of two envelopes containing such reports was not sealed when the record was transmitted to this court. Defendants' examination of the contents of that unsealed envelope forms the basis for their Jencks Act argument.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM, 1960 — APRIL SESSION, 1961

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. LEONARD M. BERNARD, CHARLES E. BERNARD and JAMES B. JACKSON, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 6, 1961

ON PETITION FOR REHEARING.

Before HASTINGS, *Chief Judge*, DUFFY, *Circuit Judge*, and MERCER, *District Judge*.

MERCER, *District Judge*. We have considered the decision and opinion of the United States Supreme Court in *Clancy* v. *United States*, decided February 27, 1961, which is cited by defendants in their petition for rehearing. In the *Clancy* case, the defendants' demand that memoranda prepared by government-agent witnesses be produced for their inspection pursuant to the provisions of the Jencks Act, 18 U.S.C. 3500, was denied by the trial judge because the written memoranda in question had not been made "contemporaneously" with the conversations therein reported. The Supreme Court reversed a judgment of conviction upon the narrow ground that the trial judge had employed an improper standard of decision in his ruling upon the Jencks Act request, inasmuch as that Act does not require, as a condition fo. compelling their production, that statements by government witnesses be made contemporaneously with conversations and interviews therein reported.

In the case at bar the trial court employed the correct statutory standard in his rulings upon defendants' request for production of written statements and reports made by agent Sharp. The *Clancy* decision has no application here.

Although we did not so expressly state in our opinion in this case, government's Exhibits 84-A and 84-C have been examined by the court. Exhibit 84-A consists of the complete, unexcised report of internal revenue agents which was signed by Sharp. Exhibit 84-C consists of the portions which were excised by the trial judge after his *in camera* examination of that complete report. From our examination of those exhibits, we conclude that the materials contained in Exhibit 84-C were properly excised from Sharp's report prior to the submission of that report to defendants for their inspection.

The petition for rehearing is denied.